general wrong to society itself—a violation of those fundamental principles of mutual trust and confidence which lie at the very foundation of all organized society, and which are necessary in the very nature of things to hold society together."

CRIMES—MANSLAUGHTER AS RESULT OF AN ACT MALUM PROHIBITUM ONLY.—Defendant, apparently through failure of service brake, lost control over the speed of his automobile on a steep down-grade. In passing a street car letting off passengers at the foot of the grade, defendant's automobile, then traveling at an estimated speed of 35 to 40 miles per hour, struck and killed deceased. Defendant was convicted of involuntary manslaughter and appealed. The judgment on the counts based on the commission of an unlawful act was reversed because of the unconstitutionality of certain statutes and a defect in the indictment, and it was *held* reversible error for the judge to omit to charge the jury, without request, the law relating to the crime of involuntary manslaughter in the commission of a lawful act without due caution. *McDonald* v. *State* (Ga., 1921), 109 S. E. 656.

The general rule is that the unlawful act must be *malum in se,* and not merely *malum prohibitum,* in order to sustain a conviction for involuntary manslaughter. 21 CYC. 765; *Com.* v. *Adams,* 114 Mass. 323; *State* v. *Horton,* 139 N. C. 588. Convictions for manslaughter based upon violations of laws regulating speed and establishing traffic rules are, however, becoming increasingly common, and this class of cases may be said to form a now well-recognized exception. *State* v. *Rountree,* 181 N. C. 535; *State* v. *McIvor* (Del., 1920), 111 Atl. 616; *Madding* v. *State,* 118 Ark. 506; *People* v. *Camberis,* 297 Ill. 455. "It is, however, practically agreed, without regard to this distinction, that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous and death ensues, that the person violating the statute is guilty of manslaughter at least, and under certain circumstances of murder." *State* v. *McIver,* 175 N. C. 761. Where the defendant is not exceeding the speed limit, or that fact is in doubt, it is generally held that, to be criminally liable, he must have been guilty of gross or wanton negligence. *People* v. *Adams,* 289 Ill. 339; *State* v. *Long,* 30 Del. 397, which was the proximate cause of the death. *Dunville* v. *State,* 188 Ind. 373. As suggested in *State* v. *McIver, supra,* the basis for the recognition of this exception is public policy, in view of the constant danger to travelers on the highways from the ever increasing automobile traffic. It is to be noted that the facts in the instant case are unusual, and if the jury should find the defendant not guilty under instructions as to the crime of involuntary manslaughter in the commission of a lawful act without due caution, it is doubtful if he could properly be convicted under the other counts.

EQUITY—CANCELLATION BECAUSE OF MISTAKE.—The defendant, who was the owner of the majority of the stock in the Banker's Trust Company, entered into a contract to sell his holdings to the plaintiff. Subsequently

a shortage of $17,000 was discovered in the assets of the company, due to the defalcation of a bookkeeper. This shortage, which had been concealed by false entries in the books, materially reduced the value of the stock. The plaintiff thereupon sued for cancellation of the contract on the ground of mutual mistake as to the assets. *Held,* since there was a clear case of *bona fide* mistake regarding material facts, without culpable negligence on the part of the person complaining, there is such mistake as to warrant a decree of cancellation. *Lindberg* v. *Murray* (Wash., 1921), 201 Pac. 759.

The parties were mistaken as to the facts creating the inducement to contract. An error, and possibly a material one, was made as to the facts which determined the value of the shares. Such an error is usually termed a mistake as to collateral matter to distinguish it from a mistake as to the identity or existence of the subject matter of the sale. To determine whether or not such a mistake should have the legal effect of justifying cancellation, the Washington court declared that "the true test in cases involving mutual mistake of fact is whether the contract would have been entered into had there been no mistake." This test is far more comprehensive than that generally accepted by courts of equity in such cases. In discussing the legal effect of various kinds of mistake, the New York court has said: "There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. * * * In such cases, if a court of equity could intervene and grant relief because a party was mistaken as to such a fact as would have prevented him from entering the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment." *Dambmann* v. *Schulting,* 75 N. Y. 55. Influenced by these considerations, the Minnesota court in the recent case of *Costello* v. *Sykes,* 143 Minn. 109, on facts almost identical to those of the principal case, refused to cancel the contract, saying: "A mistake relating merely to the attributes, quality or value of the subject of a sale does not warrant rescission." This view is quite the antithesis of that of the principal case, and, if strictly adhered to, would be nearly as objectionable. That a mistake as to quality or value will, in fact, warrant cancellation, at least in extraordinary cases, is well illustrated by *Sherwood* v. *Walker,* 66 Mich. 568. The most satisfactory solution of the problem involves taking a position somewhere between the two extremes above indicated. This middle ground is well expressed in the leading English case of *Kennedy* v. *Panama, etc., Mail Co.,* L. R. 2 Q. B. 580, where the court, in discussing the legal effect of mistake, said that the problem "in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." In other words, a mistake should go to the very essence of the contract to justify cancellation by a court of equity. This is obviously quite different from a mere mistake as to a fact, a knowledge of which would have prevented the contract. Furthermore, the determination of the

question cannot be accomplished by the application of a geometrical test such as that suggested in the principal case, but, again to quote the words of the English court, it "must depend upon the construction of the contract and the particular circumstances of the particular case." According to Holmes, C. J., in *Dedham Natl. Bank* v. *Everett Natl. Bank,* 177 Mass. 392, "the ground of recovery * * * under a mistake of fact is that the existence of the fact supposed was the conventional basis or tacit condition of the transaction." The Washington court will be compelled to recede from its position in the principal case unless it intends to extend relief to a vast number of cases of mistake which have not been generally recognized as warranting the interposition of equity.

EQUITY—INJUNCTION AGAINST USURPATION OF OFFICER'S DUTIES.—The charter of Oklahoma City vested the powers of city government in five commissioners. One provision of the charter placed the police department under the supervision of the mayor. Another provision authorized the commission by a vote of four to one to "transfer duties from one commissioner and from one department to another commissioner and another department." By such a vote the control of the police department was transferred from the mayor to the commissioner of accounting and finance. Upon a bill for an injunction, *held,* the charter could not be construed to empower the commissioners to make this transfer, and equity had jurisdiction to enjoin the assumption of authority over the police. *Walton* v. *Donnelly* (Okla., 1921), 201 Pac. 367.

The court drew attention to the fact that it was not called upon to determine the complainant's title to his office, and placed its decision upon the ground that there was no legal remedy, because information in the nature of *quo warranto* was confined to the determination of title to office, and could not be used to determine who should perform particular official duties. The scope of a *quo warranto* proceeding is generally regarded as so limited. HIGH, EXTRAORDINARY LEGAL REMEDIES, § 618. *Quo warranto* was held not to be the proper remedy to prevent city officers from levying and collecting taxes beyond the city limits. *People* v. *Whitcomb,* 55 Ill. 172. Injunction and not *quo warranto* was held to be the proper remedy to prevent the county tax collector from paying into the county treasury taxes levied upon city property. *Sanderson* v. *Texarkana,* 103 Ark. 529. In a recent case, however, a writ of prohibition was granted to prevent the circuit court from assuming jurisdiction to grant an injunction to restrain the circuit judges from classifying the deputies in county offices, under a statute authorizing this, the injunction being asked upon the ground that the statute was unconstitutional. The reasons given were (1) that equity has no jurisdiction to restrain political acts; (2) the legal remedy by proceeding in *quo warranto* was available, because the statute giving the remedy of *quo warranto* made it available to protect "franchises," and in its broad sense a franchise may include the right of a public officer to perform official duties as well as the rights of corporations. *State* v. *Dawson* (Mo., 1920), 224